



**BILLING CODE 4810-25-P**

**DEPARTMENT OF THE TREASURY**

**48 CFR Parts 1009 and 1052**

**Department of the Treasury Acquisition Regulations; Tax Check Requirements**

**AGENCY:** Department of the Treasury.

**ACTION:** Final rule.

**SUMMARY:** This rule finalizes without change an interim rule that amended the Department of the Treasury Acquisition Regulation (DTAR) by adding a subpart titled “Responsible Prospective Contractor” and a paragraph concerning Representation and certifications regarding responsibility matters, for the purpose of directing IRS contracting officers to the newly added DTAR subpart titled “Tax Check Requirement,” which prescribes the policies and procedures for performing a tax check on the apparent successful offeror in order to determine eligibility to receive an award.

**DATES:** Effective date: [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

**FOR FURTHER INFORMATION CONTACT:** Thomas O'Linn, Procurement Analyst, Office of the Procurement Executive, at (202) 622-2092.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The DTAR, which supplements the Federal Acquisition Regulation (FAR), is codified at 48 CFR Chapter 10.

It is in the interest of the United States Government to only award contracts to entities that are responsible and law abiding. This is codified in FAR 9.104 by requiring contracting officers to perform a responsibility determination prior to each contract award by using the standards at FAR 9.104-1, as well as consider information submitted by the contractor and information they research or acquire from other sources. The IRS administers the Internal Revenue Code as enacted by Congress. Since fiscal year 2012, language in the annual consolidated Appropriations Act has prohibited the Federal Government under various conditions from using appropriated funds to enter into a contract with a prospective contractor unless the prospective contractor certifies in writing that it has not been notified of any unpaid Federal tax assessment. Most recently, Sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) prohibits the Federal Government from entering into a contract with any corporation where the awarding agency is aware of an unpaid Federal tax liability.

For purposes of tax administration, the IRS has access to taxpayer return information that is not otherwise available to other Federal Agencies pursuant to 26 U.S.C. 6103(h)(1). The Department of the Treasury has determined that an IRS contractor's compliance with the tax laws is a tax administration matter. Additionally, 26 U.S.C. 6103(c) authorizes the IRS to disclose a taxpayer's return information to such person(s) as the taxpayer may designate in a consent to such disclosure. In many cases, however, the official signing a contract proposal on behalf of an offeror will not be an official to whom the IRS is authorized to disclose the offeror's tax information. Thus, in order to ensure that IRS is authorized to discuss the offeror's own tax information with an authorized official of the offeror, a consent to disclosure is required. This consent to disclosure must be in the form of a separate written document pertaining solely to the

authorized disclosure and must be signed and dated by an authorized person as required and defined in 26 U.S.C. 6103(c) and 26 CFR 301.6103(c)-1(e)(4).

## II. Interim rule.

On November 16, 2017 (82 FR 53426), the Department issued an interim rule to amend the DTAR to establish policies and procedures that facilitate successful, timely, and economical execution of IRS contractual actions in compliance with the FAR and various appropriation restrictions. Specifically, the interim rule established an express requirement for IRS contracting officers to use taxpayer return information that is available only to IRS to perform a tax check on the apparent successful offeror for purposes of determining eligibility to enter into a contract with the IRS. The IRS has established an internal Procedure, Guidance and Information (PGI) that further supplements the DTAR requirement for IRS contracting officers to use when conducting a tax check. To ensure compliance with 26 U.S.C. 6103(h)(1) and to safeguard taxpayer return information, the PGI restricts the number of personnel within the IRS Office of Procurement who have access to tax compliance information. The PGI also limits the amount of information provided to the contracting officer regarding a delinquent Federal tax liability. Upon notification by the contracting officer that the offeror has a delinquent Federal tax liability, the offeror may provide the contracting officer with documentation that demonstrates the offeror's tax status as paid-in-full or that an approved payment agreement has been reached, at which time the contracting officer will coordinate with the appropriate office within IRS to validate the offeror's tax status (see FAR 9.104-5(a)(1), (b)(1) and (e)).

The offeror may want to take steps to confirm it does not have a delinquent Federal tax liability prior to submission of its response to the solicitation. If the offeror recently settled a delinquent Federal tax liability, the offeror may want to take steps to obtain information in order

to demonstrate the offeror's responsibility to the contracting officer, if such information is requested (see FAR 9.104-5(a)(1) and (b)(1)).

The interim rule supplemented paragraph (b) of FAR 9.104-5, Representation and certifications regarding responsibility matters, for the purpose of directing IRS contracting officers to the newly added DTAR subpart 1009.70, which prescribes the policies and procedures for performing a tax check on the apparent successful offeror to determine eligibility to receive an award.

The interim rule added DTAR subparts 1009.1, Responsible Prospective Contractors, and 1009.70, Tax Check Requirements. This latter subpart prescribes the policies and procedures IRS contracting officers will use for performing a tax check on the apparent successful offeror to determine eligibility to receive an award. Definitions of terms “authorized representative(s) of the offeror,” “delinquent Federal tax liability,” and “tax check” are included within this subpart. The definition of “authorized representative(s) of the offeror” is the person(s) identified to the IRS contracting officer by the offeror as authorized to represent the offeror in disclosure matters pertaining to the offer. The definition of “delinquent Federal tax liability” is derived from language within the FAR concerning Federal tax delinquency and unpaid Federal tax assessment (see FAR 9.104-5). The definition of “tax check” is an IRS process that accesses and uses taxpayer return information, that is available only to IRS, to support the Government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104-5(b)).

The interim rule added a provision to be inserted in all IRS solicitations regardless of dollar value, including those for commercial items. The provision will notify offerors that the IRS will conduct a tax check because the Department of the Treasury has determined that an IRS contractor's compliance with the tax laws is a tax administration matter, and that taxpayer return information is needed for determining an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a unpaid Federal tax liability (see FAR 9.104-5(b)). The provision also contains a consent to disclosure to be signed and dated by a person authorized to act on behalf of the offeror as defined in 26 CFR 301.6103(c)-1(e)(4). The consent to disclosure authorizes the officers and employees of the Department of the Treasury, including the IRS, to disclose the results of the tax check to the person(s) authorized by the offeror via the signed consent to disclosure.

Under the interim rule, this provision applies to all IRS solicitations regardless of the dollar value, including commercial items (including Commercially Available Off-the-Shelf items). This determination is consistent with the FAR requirements regarding the inclusion of the provisions 52.209-5, 52.209-11 and 52.212-3 as well as various appropriation restrictions.

### III. Summary of Public Comments and this Final Rule

The comment period for the interim rule closed on January 16, 2018. Treasury received twenty-seven comments and twenty-six of those were outside of the scope of the regulation. The one comment within the scope supported the rule. The commenter noted that the rule will improve the contracting system by making the award process fairer and more efficient. Accordingly, the interim rule is adopted in this final rule without change.

#### IV. Regulatory Procedures

##### Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

##### Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. chapter 6) generally requires agencies to conduct an initial regulatory flexibility analysis and a final regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

It is hereby certified that this final rule will not have a significant economic impact on a substantial number of small entities. In this final rule, the Department is adopting an interim rule without change. The interim rule amended the DTAR to establish an internal process that strengthens IRS' compliance with appropriation act restrictions and the FAR prohibition of entering into a contract with contractors having a delinquent Federal tax liability (see FAR subpart 9.1) and should not have significant economic impacts on small entities other than the potential for not receiving award if the small entity has a delinquent Federal tax liability. This

rule does not impose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate, overlap, or conflict with other Federal rules.

List of Subjects in 48 CFR Parts 1009 and 1052

Government procurement.

For reasons set forth in the preamble, the interim rule published on November 16, 2017 (FR-Doc 2017-24911) is adopted as final without change.

Date: March 6, 2018

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Iris B. Cooper

Senior Procurement Executive

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